No. 16267.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 161.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, - *Plaintiff in Error.*

vs.

McCANN & SMIZER, a co-partnership composed of WILLIAM C. McCANN and WILLIAM B. SMIZER - *Defendants in Error.*

IN ERROR TO THE SUPREME COURT OF MISSOURI.

STATEMENT OF FACTS UPON THE PART OF THE DEFENDANT IN ERROR.

Not being favored with a statement of this case, as contained in the brief of the plaintiff in error, it is thought best to present a short statement upon our own part.

The action was begun in the Circuit Court of Monroe County, Missouri, by William C. McCann and Milton B. Smizer, a co-partnership, against George A. Eddy and H. C. Cross, Receivers of the Missouri, Kansas & Texas Railway Company, defendants, in 1890, where judgment was obtained by the plaintiffs for the sum of $654.12. The cause was appealed to the Supreme Court of the State of Missouri, and heard at the October Term, 1893, before Division No. 2 of said court, which resulted in a judgment of reversal by an opinion rendered by Judge T. A. Sherwood. Pending a rehearing before said court both defendants, George A. Eddy and H. C. Cross, died, whereupon the cause was by agreement revived against the Missouri, Kansas & Texas Railway Company and said Company by agreement substituted as defendant.

Upon hearing the motion after the action was revived against the M., K. & T. Railway Company the court granted a rehearing therein and the case was transferred from Division 2 to the court in *banc*, where it again was heard the succeeding term of the court and the cause affirmed, all the judges concursing except Judge Sherwood, who dissented.

The petition states a common law action for damages against George A. Eddy and H. C. Cross, Receivers aforesaid, on account of negligent delay beyond a reasonable time in the shipment of ninety-nine head of cattle from Stoutsville, Missouri, to the Union Stock Yards at Chicago, Illinois The petition is set out in full on pages 5 to 8 in the printed transcript of the record filed in this court. The answer, on page 8 of the transcript, admits the receivership and operation of the road and receipt of the cattle November 9, 1890, for shipment to Chicago, but

avers that the shipment was made under special contract entered into between the parties in and by which contract it was agreed and stipulated, among other things, as follows:

"1st, That he [meaning the plaintiff] hereby releases the party of the first part [meaning the defendant] from the liability of a common carrier in the transportation of said stock, and agrees that said liability shall only be that of a mere forwarder or private carrier for hire. He also hereby agrees to waive, release, and does hereby release said first party from any and all liability for or on account of any delay in shipping the said stock after the delivery thereof to its agent and from any delay in receiving the same after being tendered to the agent.

4th, That he, the said party [meaning the plaintiff] for the consideration aforesaid, hereby assumes, and releases said first party [meaning the defendant] from risk of injury or loss which may be sustained by reason of any delay in the transportation of said stock, caused by any mob, strike, threatened or actual violence to person or property, from any source, failure of machinery or cars, injury to track or yards, storms, floods, escape or robbery of any stock, overloading cars, fright of animals, or crowding one upon another, or any or other causes except the negligence of said first party; and such negligence not to be assumed but proved by said party of the second part."

And said contract also contained, among other things, the following stipulation and agreement, which is pleaded in the answer as follows:

"13th, And it is further stipulated and agreed between the parties hereto, that in case the live stock mentioned herein is to be transported over the road or roads of any other railroad company, the said party of the first part shall be released from liability of every kind after said live stock shall have left its road, and the party of the second part hereby so expressly stipulates and agrees, the understanding of both parties hereto being that the party of the first part shall not be held or deemed liable for anything beyond the line of the Missouri, Kansas & Texas Railway excepting to protect the through rate of freight named herein."

The reply was as follows:

"Plaintiff for reply to defendant's answer, filed in this cause, denies that plaintiff executed said alleged contract, set up in defendant's answer, and plaintiff further says that said alleged contract, if any, was wholly without consideration and void and contrary to public policy."

The evidence shows the execution by both parties of a contract of shipment, set out in full on page 25 of the transcript of the record. That the stock was received by the receivers under said contract and transported by them over the M., K. & T. to Hannibal, Mo., and from thence over the Wabash *in the same cars* into which they were loaded to Chicago. That there was a joint yard service at Hannibal, Mo., between the M., K. & T. Railroad Co. and the Wabash Railroad Co. That the M., K. & T. Railroad ended at Hannibal, Mo., at which place it further connected with the Wabash road. The defendant in error is shown to have had no control, care or custody over the cattle, after signing the contract, until he received them at the Union Stock Yards, Chicago, and that the M., K. & T. Railroad Co. made all arrangements with the Wabash Company for transportation over its line and received from the defendants in error the full freight charges for transportation over the entire distance, and paid the Wabash Company for its service in completing the contract of shipment.

The evidence also shows that there were *in fact no reduced rates given to defendants in error*, as recited in the contract, but that the same rates were charged, whether there was or whether there was not a special contract; that there was but one rate given to shippers of live stock between Stoutsville and Chicago and that was the rate named in this written contract and de-

clared therein to be a reduced and special rate. The plaintiff in error *offered no evidence* that any special rate was given *lower than the regular rate*, or that any option or choice of rates was tendered to the defendant in error.

And the evidence tended to show that the stock was shipped from Stoutsville to Hannibal without any unreasonable delay and that the loss and damage on account of delay occurred after the stock had left the line of road of the M., K. & T. Railroad.

Further, the evidence disclosed that the stock was negligently permitted to stand for *four* hours in the City of Chicago in less than *two miles* of the union depot, the point of destination named in the contract of shipment, during which time and delay the market for the class of cattle which constituted this shipment had declined twenty-five cents, on account of which decline in the market and subsequent loss and shortage in weight, during the time of their arrival and the time, they were sold and this and the cost paid for feed of said cattle, constituted the damages complained of.

The defendant asked the following instructions, which the court declined to give:

I. "The court instructs the jury that under the pleadings and and evidence your finding must be for the defendant.

II. "The court instructs the jury that under the contract read in evidence, under which plaintiff's cattle were shipped, the defendant are not liable for any damages sustained by delays or otherwise after said cattle were delivered by defendants to the next connecting carrier.

III. "The court instructs the jury that defendants are not liable under the contract of shipment read in evidence, for any damages or delays occurring on any other railroad than the one operated by the defendants, and if you find from the evidence that the defendants transported plaintiff's cattle from Stoutsville to Hannibal without unreasonable delay and delivered said cattle to the Wabash Railway Company, as a connecting carrier, within the time usually and reasonably required for such transportation and delivery, that the defendants are not liable in this case, notwithstanding said cattle may have been unreasonably delayed on said Wabash Railroad, and your finding must be for the defendants."

Whereupon the court, on its own motion, gave the following and seven other instructions in the case:

I. "If from the evidence the jury find that beyond the limit of a reasonable time upon the delivery of plaintiff's cattle at the Union Stock Yards at Chicago, Illinois, the Wabash Railway Co. negligently delayed said delivery and thereby directly caused pecuniary damages to plaintiff in the disposition of said cattle the jury will find for plaintiffs, and in default of such finding the jury will find for the defendants."

The other instructions are found on pages 57 and 58 of the transcript of the record. It is only deemed necessary to set out the first instruction of the court as it is conceded in this case that the other instructions properly declared the law, if under the contract and facts in evidence the defendant could be held at all for the negligence that occurred beyond its line of road.

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BRIEF OF ARGUMENT AND STATEMENT OF POINTS FOR DEFENDANT IN ERROR.

I.

The Supreme Court of Missouri did not err in deciding that Section 944 of the Revised Statutes of the State of Missouri of 1889 is not repugnant to the Constitution of the United States.

The said Statute is not repugnant to and in conflict with the Constitution of the United States; because (*a*) the statute, as interpreted by the Supreme Court of the State of Missouri, does not regulate or attempt to regulate commerce between the states; and, because (*b*) it neither requires the plaintiff in error to carry, nor prevents it from carrying any freight between the states mentioned, or any other states; and, because (*c*) it neither requires the plaintiff to contract for such carriage nor prevents it from making any valid contract limiting its liability either within or without that state. Nor does it impose any liability against the plaintiff in error which it is not against the policy of the law to permit it to avoid. Its only effect is to prevent it from releasing itself from liability for its own negligence or the negligence of its agents. It only prevents the carrier from assuming a contract for through carriage and at the same time avoid liability against itself and agents in the performance of its undertaking.

Dimmitt vs. Railroad Co., 103 Mo., 440.
McCann & Smizer vs. Eddy & Cross, 133 Mo., 59.
Liverpool & C. Co. vs. Phoenix Ins. Co., 129 U. S., 397.
N. J. Steam Novelty Co. vs. Merchants Bank, 47 U. S.—6 How. 344.
Michigan Central R. R. Co. vs. Min. Springs Mfg. Co., 83 U. S., 16 Wall 318 (21-297.)
N. Y. Central R'y Co. vs. Lockwood, 84 U. S., 17 Wall 357
Ogdenburg & L. C. R. Co. vs. Pratt, 89 U. S., 22 Wall, 123-134.
Bank of Ky. vs. Adams Express Co., 93 U. S., 174.

II.

The court did not err in refusing to give the three instructions asked by plaintiff in error, whereby it claimed release from all liability after the stock left its road; nor did the court err in giving of its own motion the eight instructions, beginning on page 59 of the transcript, because, by the through contract (set out on page 25 of the transcript) the plaintiff in error had bound itself to carry the stock to the place of ultimate destination at Chicago; therefore, its connecting carrier, the Wabash was its agent to complete its contract of shipment. The carrier cannot stipulate to release itself from its own negligence or the negligence of its agents.

Woods' R'y Law, Vol. 1, Sec. 1, 190, Pg. 545.
Wharton on R'ys, Sec. 589.
Hutchinson on Carriers, 2d Ed., Secs. 248, 257, 263.
Grover & Baker Machine Co. vs. Mo. P. R'y Co., 70 Mo.,674.
Holliday vs. St. L. K. C. & N. R'y Co., 74 Mo. 162.

Railroad Co. vs. McCarty, 96 U. S., 258.
Ogdensburg & Co. vs. Pratt, 22 Wall, 123.
R'y Co. vs. Lockwood, 17 Wall, 357.

III.

It is conceded that a carrier may, notwithstanding Sec. 994, Revised Statutes of Mo., 1889, limit its liability to negligence occurring on its own road, provided it contracts only to carry to the terminal point, stating it will carry the goods no further; or, what is equivalent, in the absence of a contract of through carriage, it may limit its liability to negligence occurring on its own line, yet, it cannot make a through contract or undertake to ship and deliver to a point beyond its line, unequivocally by contract binding itself to carry and deliver to point of destination, and, at the same time, limit its liability for negligence occurring on its own road. Such contracts are against public policy.

McCann and Smizer vs. Eddy, 133 Mo., 59.
Halliday vs. Railroad Co., 74 Mo., 161.

IV.

Contracts limiting liability are to be construed by the courts most strongly against the carrier. and all doubts and ambiguities will be resolved in favor of the shipper.

Hale on Bailments and Carriers, p. 9, 433.
Levering vs. Union Transp. Co., 42 Mo. 88 and cases cited.
Hutchinson on Carriers, 223, Sec. 262.

Even if Sec. 944 of the Revised Statutes of Mo., 1889, as construed by the Supreme Court of the State of Missouri, should be held to be repugnant to the Constitution of the United States, and even if it should be held that the carrier may contract, in proper terms, against his negligence on any part of the line of carriage, the plaintiff in error has not effectually contracted against such negligence in this case, because (*a*) it has not done so in plain, clear and specific terms, and because (*b*) by the terms of the fourth clause of the contract (page 27 of the printed transcript) the carrier is bound specifically for his negligence.

Hutchinson vs. Carriers, 2nd Ed., Secs. 261, 264, 270.
Westcott vs. Fargo, 61 N. Y., 542.
Maguire vs. Deusmore, 56 N. Y., 168.
Nicholas vs. Ry. Co., 89 N. Y., 370.
Canfield vs. Ry. Co., 93 N. Y., 532.
Holsapple vs. Ry. Co., 86 N. Y., 275.

V.

There was an expressed but no real consideration for such alleged releases. Plaintiff's uncontradicted evidence shows a total lack of said such alleged consideration.

McFadden vs. Mo. P. Ry. Co., 92 Mo., 351.
Fountain vs. Boatmen's Sav. Band, 57 Mo., 552.
York Mfg. Co. vs. Ill. Cent., 3 Wall, 107.
McMillan vs. M. S. & N. I. Ry. Co., 16 Mich., 116.

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ARGUMENT.

I.

The present contention between the plaintiff and defendant in error arises out of the construction which the Supreme Court of the State of Missouri has given the contract between the parties. The plaintiff in error contends that the Supreme Court of the State of Missouri in holding and deciding that Section 944 of the Revised Statutes of 1889, as construed by them in connection with the case, is repugnant to the Constitution of the United States.

And second, that said section of the statute above referred to is repugnant to and in conflict with the Constitution of the United States, for the reason that it attempts to, and if enforced according to its terms and purposes, does regulate commerce between different states; and that the Supreme Court of Missouri erred in holding that under the effect of said statute the plaintiff in error was liable in this cause for the negligence of another carrier in the State of Illinois upon a shipment from a point upon the road of the plaintiff in error in the State of Missouri to a point on another line of road in the State of Illinois.

In order to determine whether or not such error was committed as here complained of, it will be necessary to examine into the terms of the contract of shipment entered into between the parties and to ascertain, first, the liability which arises therefrom under the laws of the State of Missouri, irrespective of the

obligations imposed by the statute and, afterwards to ascertain what office or function the statute in dispute is made to perform by the court in the construction of the contract.

The Supreme Court of the State of Missouri held that the contract, which is set out in full on page 25 of the printed transcript of the record in this cause, is one of a through carriage by the plaintiff in error, and that in this respect it is an unconditional contract, by which the plaintiff in error bound itself absolutely for the carriage of the stock over the entire distance they were to be transported, and agreed thereby to deliver the same at the place of destination, namely: the Union Stock Yards at Chicago, Illinois; that the contract, construed as a whole, is susceptible of no other reasonable contention by the laws governing the construction and interpretation of written agreements; and that the thirteenth clause, and other clauses therein, even if valid and binding upon the shipper, are not clauses releasing, or attempting, or even purporting to release it from its primary duty of carriage which it assumed over the entire distance, but are clauses releasing, or purporting or attempting to release it from *liability* from such acts of carriers after such stock shall have left its line of road.

Such was the conclusion reached by the Supreme Court of the State of Missouri, and it seems to us that such must be the conclusion and holding of this court, when it reviews the language employed in the instrument itself.

For the purpose of discussing the scope of the obligation, which the plaintiff in error assumes, with respect to its contract of carriage, we will here quote only so much of the contract as

relates to the contract of the carrier. The instrument is headed "LIVE STOCK CONTRACT NO. 10," and recites:

"This agreement made and entered into between George A. Eddy and H. C. Cross, Receivers of the M., K. & T. Railway Company, parties of the first part, and M. B. Smizer, party of the second part, witnesseth, that, whereas, the Receivers of the Missouri, Kansas & Texas Railway TRANSPORT the live stock as per rules and regulations which are hereby made a part of this contract, by mutual agreement hereto; now, therefore, for the consideration and mutual covenants and conditions herein mentioned, the said party of the first part is to TRANSPORT THE LIVE STOCK DESCRIBED BELOW, AND THE PARTIES IN CHARGE THEREOF, as herein provided, namely, ninety-five head of cattle, m. or l. o. r. [meaning more or less at owners risk] from STOUTSVILLE, MISSOURI, TO CHICAGO, ILLINOIS STATION, consigned to Brown Brothers and Smith, at a through rate of 17 1-2 cents per hundred pounds from STOUTSVILLE, MISSOURI, TO CHICAGO, ILLINOIS, subject to the minimum weights applying to cars of various lengths, the same being a special rate, lower than the regular rate, or a rate mutually agreed upon between the parties, for, and in consideration of which the said second party covenants and agrees as follows:"

Then follows fifteen clauses enumerated in the contract, all limiting its liability and obligation as a common carrier between the points named; but, in none of which, is there any waiver or release from the obligation already assumed, TO CARRY the said live stock over the entire distance according to its original undertaking in the language of the contract above quoted.

In the face of language, so clear, concise and seemingly so susceptible of but one construction, it would appear trite and common place in counsel to dwell upon its meaning were it not for the contention of the plaintiff in error, that this obligation of through carriage, as above assumed, is so modified and limited by

the thirteenth clause of the contract as to be thereby transformed into a contract only to carry the stock to the terminus of its road, which ends in Hannibal, Missouri.

The said thirteenth clause, to which such magical virtue is assigned, only purports to be a RELEASE FROM THE LIABILITY attending its already assumed obligation or undertaking as a carrier over other lines of road, in the event the live stock mentioned is to be transported over other lines of road.

The following is the thirteenth clause in full:

"And it is further stipulated and agreed, that in case the live stock, mentioned herein, IS TO BE TRANSPORTED over the road or roads of any other railroad company, the said party of the first part shall be RELEASED FROM LIABILITY of every kind, after said live stock shall have left its road, and the party of the second part hereby so expressly stlpulates and agrees, the understanding of both parties hereto———that the party of the first part shall not be held and deemed liable for anything beyond the line of the Missouri, Kansas & Texas Railway, excepting to protect the through rate of freight named herein."

Now, can it be rationally contended that this clause last quoted has the effect to nullify the primary agreement, as already expressed, to carry the stock and the parties in charge thereof, from STOUTSVILLE TO CHICAGO? Certainly it does not say so. There is nothing in the language employed that would indicate such an intention. It only says: "That in case the live stock is to be transported over the roads or road of any other railroad company, the said party of the first part shall be released from liability of every kind after the stock shall have left its road." Mark the language, "in case the live stock is to be transported." Transported by whom? Evidently by the party of the first part, the M., K. & T. Railroad Company,

who has agreed to carry both the shipper and his stock. Not to Hannibal, or any other point named or intimated, but to Chicago as plainly expressed. Who else had agreed to transport the stock at all? With whom else had the defendant in error any agreement of carriage at all? Observe again the following language: "In case the stock mentioned is to be transported, etc., the party of the first part shall be RELEASED FROM LIABILITY OF EVERY KIND after said stock shall have left its road." Shall be released from what? Not from the obligation of the carrying beyond the road, because it had already undertaken to carry the stock to Chicago. It did not ask a release from its obligation to carry the stock to Chicago; it seeks no release from its obligation. Then what what release is asked by this clause? Plainly, as there stated, *a release from liability* for such carrying beyond its road. What other meaning, consistent with the contract as a whole, could be attached to the clause here quoted, if we apply no other rule of construction than that of logic and common sense? There was no other meaning intended by the author of this contract and none other can be rationally imputed to it and preserve the integrity of the contract and secure harmony among its clauses. The primary undertaking is to transport from Stoutsville to Chicago. The word "transport," as defined by Webster, means "to carry or to convey from one place to another; to remove; to convey." In the case of Ogdenburg, etc., Railroad Co., vs. Pratt, 22 Wall. 123, where the language of a way bill described "merchandise transported from Pottsdam to Boston," the court held that the word "transport" and "carry" were equivalent terms.

Hence, it would seem to us, that the Supreme Court of the State of Missouri properly held in the following language, in McCann & Smizer vs. Eddy, 133 Mo., that:

"The agreement to carry from Stoutsville to Chicago is absolute unconditional and that the thirteenth condition or covenant can only be regarded as an attempt on the part of the defendant to release itself from the liability of answering for the negligence of the carrier by which it undertook to complete its contract."

The court further held that:

"The statute forbids such qualification of the contract, which can only be held to relieve the defendant from its common law liability."

Whereupon under this condition of facts the question presented to the court was: May a carrier under the laws of the State of Missouri make a contract of through carriage, complete and binding in itself, by which it secures the right and privilege of a through line of road and all the advantages of through carriage; and may it take away from the shipper the care, custody and control of his stock until they should be redelivered to him or his consignee at Chicago and divest him of all right to make any other contract, and receive from him a full compensation for its agreement to ship over the entire distance, and employ and pay other companies and agencies to aid it in the completion of its agreement, and at the same time avoid all liability for the negligence of those whom it employes and pay to complete its contract and agreement?

The Supreme Court of Missouri thereupon held that:

"The dictum in the Dimmitt case, 103 Mo., 440, to the effect, that an agreement that a carrier should be only liable for loss or damage occurring on its own line of road, was equivalent to an expressed contract to *carry* the property *only* to the terminus of

its own line, cannot be taken as the law of this case, where there is an expressed contract (to carry) and an agreement for non-liability."

And, in this case, the state court simply held that:

"The statute merely prohibited a carrier who by contract undertakes to transport to a point beyond its own route, from relieving itself from responsibility for neglect to properly perform its duty. It only imposes the duty and liability which the law from considerations of public policy imposes upon all common carriers in transportation of property over their own lines, though they may extend into other states."

II.

The plaintiff in error asked for three instructions. The first a peremptory instruction asking for verdict and finding for plaintiff in error. The second asked the court to declare that it was not liable for any delays after the cattle were delivered to the next carrier. The third asked the court to declare that, under the contract in evidence, it was not liable for any damages or delays upon any other railroad than that operated by the defendant. All of which the court refused to give, and thereupon gave the following instruction upon its own motion:

"If from the evidence the jury find, that beyond the limit of a reasonable time for the delivery of plaintiff's cattle at Union Stock Yards at Chicago, Illinois, the Wabash Railway Company, negligently delayed said delivery and thereby directly caused pecuniary damage to the plaintiff in the disposition of said cattle, the jury will find for the plaintiff, and in default of such finding they will find for the defendant."

This was a correct declaration of the law of the case. It was manifest by the evidence that the plaintiff in error had contracted to carry and deliver the cattle from Stoutsville to the Chicago Union Stock Yards, and that it made its own arrangement

with the Wabash Company to complete for it its further transportation of said cattle beyond the terminus of its road at Hannibal.

It was clearly shown that there existed between the Missouri, Kansas & Texas and the Wabash Railways the closest and most intimate shipping arrangement, that by previous agreement the M., K. & T. had a right to contract, and did contract shipments over the Wabash road. There was shown to be a joint service at the outer depot at Hannibal and that the Yard Master (Henwood) was in the joint service of the two roads; that they had an agreement and arrangement by which they apportioned the charges of transportation; that he (Henwood) while employed and paid by the M., K. & T., had the right to order engines from the Wabash shops at Springfield, Illinois, to carry the M., K. & T. freight from Hannibal to Chicago; that when he was notified by the M., K. & T. from Sedalia that he would notify the Wabash at what time he would start the Wabash train from the termination of the M., K. & T. road at Hannibal; that he (Henwood) had control of making up the Wabash trains at Hannibal and starting them out on their journey to Chicago; that he made up this stock train carrying plaintiff's stock and started it on its journey over the Wabash railroad to Chicago. (See pages 45 and 52 of transcript of the record.)

Hence it was apparent, both from the terms of the contract and the oral evidence introduced at the trial, that the plaintiff in error had constituted the Wabash Railroad its agent to complete the contract of shipment, and it was not thereupon entitled under

the instruction of the court to be released from its acts of negligence and the court properly so instructed.

Indeed, would it not be a seeming abandonment of a fixed purpose upon the part of the courts, to thus permit these carriers, by such system of contract jugglery to circumvent the long established policy of the law not to allow them toply their vocations as common carriers without at least assuming responsibility for their negligence in so doing, as well as responsibility for the negligence of those whom they employ? Such has never been the holding of this court nor the recognized doctrine of this country, as declared by the Supreme Courts of nearly, if not quite all, of the states in the Union. How, therefore, can a statute, whose only effect, as declared by the Supreme Court of Missouri, is to avoid an attempted release from liability for negligence in the performance of a duty which the carrier has by contract assumed and undertaken to perform, be held invalid? How can it be said to be unconstitutional and void in the sense that it undertakes to regulate commerce among the states? The court below did not so construe it. We do not believe that this court will so hold.

III.

There should be no difference between counsel for plaintiff and defendant in error and no room for any argument before this court concerning the liability to which carriers are heid under the law declared by the Supreme Court of the State of Missouri. In that state the law has long been settled, and that too, in harmony with the general law of liability, as decided by the majority of the states of the Union, and in practical harmony

with the law as declaoed by this court. The law as declared in that state, in the absence of a contract of carriage, holds the carrier to its common law liability for negligence over its own line of road. But that the carrier may stipulate for a limitation of its responsibility, so far as it is an insurer, against loss by mistake or accident, but it cannot exempt itself from losses caused by a neglect of that degree of diligence which the law casts upon it, or from its character of bailee. In an early and well considered case the Supreme Court of the State of Missouri, speaking through Judge WAGNER, in the case of Levering, etc., vs. The Union Trust Insurance Co., 42 Mo. 83, says:

"The argument in favor of the right of the carrier to vary his liability by introducing a condition into its acceptance is founded on a misconception, in considering that its *liability* is voluntary and arises *ex contractu*. The law attaches the responsibility to his employment or calling; and, if he assumes the calling, he has no power over the *duties* which the *law annexes* to that calling. His assuming the character of a common carrier, depends entirely upon his own will, or assent; but, if he undertakes the occupation, the liability which comes upon him, in respect to the goods brought or borne to him, to be carried, are imposed by law and not created by assent or agreement."

This equitable and just doctrine is carried to its logical effect through all the subsequent decisions of that court, and will be adverted to hereafter in connection with the contract of shipment in this case. This was the rule and law of liability before the enactment of Section 944, of the Revised Statutes of State of Missouri, in controversy. Of course this liability only extended to its own line of road. When, therefore, it had delivered the goods to its next carrier all duty of carriage ended, and, therefore, all liability for such carriage ended. It could not refuse to carry the goods over its own road but was bound

by law to receive and carry them, because it had held itself out as a public carrier over its road; and, having voluntarily assumed this character, the law imposes the duty to carry, and the liability of such act of carriage to the end of its road. Therefore, in the absence of any contract made by the carrier, by which it undertook to perform the office or function of a carrier beyond its own line of road, there was no further duty or obligation resting upon it beyond its said line. Under the law of the State of Missouri none was fastened or attempted to be fastened upon it. But in the case of Loomis vs. The W. & St. L. & P. Ry. Co., 17 M. A. 350, it was said by Phillips, P. J.:

"We may concede the proposition that a common carrier is not ordinarily bound to carry freight beyond the terminus of its line of transportation, but the law is equally well settled that it may by contract extend its undertaking to deliver beyond its terminus."

Now, while the carrier is not bound by law to carry, or contract to carry beyond its terminus, it is equally well settled that it is not prohibited by law from entering into such a contract or undertaking. So, in Missouri at least, there is no doubt that it may undertake the duty and assume the obligation to carry beyond its own line. But may it undertake this duty and assume the character of a common carrier and at the same time avoid liability therefor? Can it by agreement reap the advantages of a contract to carry beyond its own road and avoid the liability which attaches to such an undertaking? When it voluntarily agrees to become a carrier over another road can it avoid the liability which the law inseparably attaches to the duty it thus assumes? In the concise language of Judge Wagner, quoted *supra*, this question is answered:

"The law attaches the responsibility to his employment or calling and if he assumes the calling he has no power over the duties which the law annexes to that calling. His assuming the character of a common carrier depends entirely upon his own will or assent, but if he undertakes the occupation the liabilities which come upon him are imposed by law."

It is the contention of defendant in error in this cause that when the carrier undertook by written contract to carry to Chicago, a point admittedly beyond its own line, it thereby forever put it out of its power to limit its liability to its own line, either in the same or any other contract; that in securing the advantages of a through contract it lost its immunity from liability beyond its road between the points it had assumed to carry. True it was not bound to contract beyond its line, neither was it prohibited from so contracting. But having so contracted, though not previously bound, it then became bound by its contract and it cannot then limit its liability for negligence for its own acts. If it has made the connecting carrier its agent to complete its contract of carriage, it cannot then escape the liability for the act of negligence of its agent employed to complete its undertaking. In other words, its indefeasible liability for negligence is coextensive with its liability to carry, whether such obligation to carry arises from law or is assumed by contract. If we follow this well established principle of law it clears away all difficulties in this case. The law says in effect:

You must watch for yourself. If you bind yourself by contract to carry beyond your own road then the law will follow you, like a shadow, with the same indefeasible liability, to so carry without negligence; and while you may limit yourself from common law liability on the connecting carrier's road over which you

agree to carry, you may do so only to that extent which you could limit your liability upon your own road. You cannot by any devise, directly or indirectly, in the same, or, any other contract limit your liability against the negligence of the agent you employed in such further transportation and your attempts to do so will be void."

Therefore, when the carrier assumed the obligation to carry beyond its line of road *eo instante* the law fixed its liability. Such was the law of Missouri as declared in the case of Dimmitt vs. The Kansas City, St. J. & C. B. Ry. Co., 103 Mo. 441, where the constitutionality of the statute, involved in this case, was called in question and decided by the court. The court in that case say:

"At the time of its enactment [meaning the statute in question] the law was as well settled as now that a common carrier may *contract* to carry to a place beyond the terminus of his route, and *thereby render himself liable as such for the whole distance.*"

How can language be more plain and unambiguous than this? By the very act of contracting to carry to a place beyond the terminus it *thereby renders itself liable* for the whole distance. Such ruling is in harmony with an unbroken line of decisions of that court. Can it, therefore, be said, consistent with reason and the law of Missouri that, because the carrier is not bound by law to carry beyond its road, it may, by a mere declaration to such effect, end completely all liability at the terminus of its road, while in the same instrument, by which it assays to end its liability, it may yet in set terms reap the rewards and benefits of a further undertaking to carry to a point beyond its line and be relieved from all liability in performing such undertaking?

IV.

But, there is another view of the case, which in our former briefs we have barely adverted to, and which, upon closer examination, seems to be conclusive of the rights of the parties, irrespective of the interpretation of the statute, which will, in our opinion, lead to the determination of this contention in favor of the defendant in error. It rests upon sound and well established principles of law, and arises alone from the interpretation of the contract by the application of well known rules of construction. The first rule invoked is, that the contract must be construed most strongly against the carrier. The second rule is, that the contract must be so interpreted as to beget harmony and avoid a conflict among its several clauses. The third rule is, that, even in jurisdictions where the policy of the law permits the carrier to contract against liability for the negligence of itself, or its agents, such contract, to have this effect, must be a contract against *negligence in express terms*, and must be in plain, clear and specific language. In other words, (says Hutchinson on Carriers, Second Edition, Paragraph 262.)

"The exemption from liability for negligence must be expressed by the use of the word [negligence] itself, or of something equivalent, and in construing the terms of such contracts, where the claim is, that such exemption is agreed to, the words will be taken most strongly against the party whose language they are and who is in an advantageous position for dictating the contract."

The same author, at paragraph 270, continuing the discussion of the subject says:

"Hence, where the agreement between the common carrier and the owner provided, in general terms, that the goods were

to be transported at the owners risk, it was held that the owner assumed the risk arising from the ordinary damages of transportation by the means employed which the reasonable and ordinary care of the carrier might be insufficient to prevent; but that the carrier was still liable for losses occurring from damages which ordinary care and prudence might have avoided, so, also the exception in the carrier's receipt of liability for loss or damage arising from the dangers of railroad, ocean, steam or river navigation, leakage, fire, or from *any other cause whatever*, was held not to exempt from liability for losses or damages occurring from its own negligence, or that of his servants. The court remarking that, the terms of these contracts are very much under the control of the carriers and they may justly be required to express in plain terms the entire exemption from which they stipulate. The language of this clause is broad; but if it be desired that a clause shall cover losses by negligence it is not too much to say that the purpose must be clearly expressed."

Now, that the Company did not use the word "negligence" itself, is clear from an inspection of the language; nor did they use any equivalent expression. And the court in construing the language used in the thirteenth clause of this contract, which declares "The party of the first part shall be released from *liability* of every kind after the stock shall have left its road," will construe it only to mean, *all liability as an insurer*, after the stock shall have left its road, and *not all liability from negligence*. This construction will carry out the original agreement between the parties in harmony, and not in conflict with the law, and, also consistent with the undertaking of through carriage as expressed in the outset. And in considering and construing the latter part of said clause, where the language used is "the understanding of both parties hereto (being) that the party of the first part shall not be held or deemed liable for anything beyond

the line of the Missouri, Kansas & Texas Railway, excepting to protect the through rate of freight named herein," the court will construe the same in connection with the language employed in the latter part of the fourth clause in said contract, which, after enumerating the various liabilities from which it is to be released, concludes with this language: "*or any other causes except the negligence of the party of the first part, and said negligence is not to be assumed but to be proved by said party of the second part.*

Now, when these clauses are thus construed together and construed so as to harmonize and not conflict with each other, it is clear that the exception mentioned in the fourth clause, namely, "except the negligence of the party of the first part," will by the court be read into the latter part of the thirteenth clause so that said clause will be read in harmony with the exception mentioned in the fourth clause. Said clause, when so interpretated, will read as follows:

13th. And it is further stipulated and agreed between the parties hereto, that in case the live stock mentioned herein is to be transported over the road or roads of any other railroad, the said party of the first part shall be released from all liability [as an insurer] of every kind after said live stock shall have left its road, and the party of the second part hereby so expressly stipulates and agrees, the understanding of both parties hereto [being] that the party of the first part shall not be held or deemed liable for anything beyond the line of the Missouri, Kansas and Texas Railway excepting to protect the through rate of freight named herein [except the *negligence* of said first party and said negligence not to be assumed but to be proved by the said party of the second part.]"

This construction is a necessary one in order to preserve harmony among the clauses and prevent a conflict in the lan-

guage in which it is written. And that, too, without thus far invoking the rule of construction that the contract shall be most strongly construed against the carrier, and, when this further rule is invoked, it seems clear and conclusive that the carrier has not in this contract, either in express or any other terms, even contracted against the negligence of the Wabash Company, but, on the contrary, it expressly provides that it shall be liable for such negligence, in the fourth clause *supra*.

V.

In their reply to defendant's answer, the plaintiffs in the court below denied the consideration in the contract, and the alleged release from liability, as in the answer specifically pleaded, and declared the same was void and against public policy. The plaintiffs below in their evidence (introduced without objection on the part of defendants) proved conclusively a total lack of the alleged consideration; and, that the said 17 1-2 cents, the alleged lower rate, was in fact the usual and only rate at said date from Stoutsville to Chicago, Ills. This was testified to by the Plaintiff Smizer and Mr. Tulley. Although these facts were peculiarly within the defendant's own knowledge, and denied in the reply, they offered no evidence to show that the same were reduced rates, as alleged in said contract, or that they had any other or different rates than the rates given plaintiffs, or that plaintiffs had any option concerning rates at all. And it is fair to presume that if the same were not the usual and only rates, but were in fact reduced rates, given in consideration of the various releases from their common law liability as carriers, then the defendants would have so shown, as it could have

so shown, if the recitals in the contract had in fact been true and that the same was, in reality, and not merely in recital, an honest, upright and true consideration for all the limitations and avoidances of every obligation known to the law by which the duty and liability as common carriers is so unalterably fixed. It is indeed unknown to plaintiffs by what occult force of secret magic this etherial consideration (existing only in naked recital) is made to support the ponderous weight of the innumerable releases from responsibility, which the law, in wisdom, has interwoven into the very fabric of their existence as common carriers. We cannot believe that courts will lend their aid or sanction to such artful subterfuges which open the highway to fraud, injustice and oppression. Yet such is the cunning devise by which they expect to play the game of "fast and loose" with the shipper, and "hide and seek" with the courts.

It was the appellant's clear intention in this contract to reap every advantage from its contract of through shipment, and, at the same time, to so limit their liability as to shirk every duty they owed to him as a common carrier.

It is likely that neither respondent nor any other shipper ever reads these outrageous contracts. It is certain, if they did, they could not grasp their legal import. Such contracts are nothing more nor less than shrewdly and ingeniously constructed pitfalls by a school of able corporation lawyers who are constantly remodeling their snares and revising their forms to comply with every utterance of a court made in their favor. An intelligent, just and exhaustive review of such contracts and the inequality of the contracting parties is found in the opinion of *Mr. Justice* BRADLEY in the ably decided case of Lockwood vs.

The Railroad Co., 84 U. S., 946; 17 Wall. 485. And so by repeated decisions of this and other appellate courts the shipper is bound by their every valid provision. But the court will only uphold such contracts when fairly and honestly entered into for a valid consideration, and will then construe them most strongly against the party whose real contracts they are, and in whose interest and behalf they are made. The record in this case expressly shows a total absence of the consideration for the alleged release by the shipper of the carrier's liability.

Hutchison on Carriers, Sec. Ed., 261.
Levering vs. Union Transit & Irs. Co., 42 Mo., pp. 92 & 93,
and many other authorities familiar to the Court.

If the shipper is bound, by the through contract, the carrier is, for a stronger reason, likewise bound. Can it be said that the cogent and conclusive reasons that have persuaded and impelled courts to uphold these contracts at the instance of the carrier, are impotent and ineffectual when evoked by the shipper? Most certainly not. Appellant will not be permitted to play a game of "Heads, I win, and tails, you lose." Appellants are not infants nor wards of the court, and if they have spread a net for respondent's feet and have become caught in its own meshes, their cries will not be heeded.

Doubtless the plaintiff in error is amply protected under its contract with the Wabash for all loss it may be required to pay on account of the default and miscarriage of that company. Even if they were not, it would be no reason why they should not be compelled to respond in damages in the sum awarded plaintiffs

and for which they have steadfastly refused to make reparation. The plaintiffs are therefore in this court seeking, not to enforce their own, but appellant's bond. There was a through contract. There was no contract for release of liability for negligence. There was no consideration for the alleged release. There is admitted negligence upon the part of the Wabash Co. The judgment was for the right party. The amount recovered is just and reasonable. There was no error in the court's instructions, and the judgment should be affirmed.

Respectfully submitted by,

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